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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 ASPEN GROVE OWNERS)
ASSOCIATION, a Washington non-profit) CASE NO. C09-1110-JCC
10 corporation,)
)
11 Plaintiff,)
)
12 v.) REPORT AND RECOMMENDATION
)
13 PARK PROMENADE APARTMENTS,)
LLC, a California limited liability company,)
14 et al.,)
)
15 Defendants.)
_____)

16
17 INTRODUCTION

18 Defendants filed a motion to hold nonparty Phillips Real Estate Services (hereinafter
19 “Phillips”) in contempt due to its failure to comply with subpoenas. (Dkt. 95; *see also* Dkts.
20 92, 113-14.)) Phillips serves as plaintiff’s property manager and custodian of records.
21 Plaintiff filed an opposition to the motion, along with responsive declarations from Diane
22 Castanes, records custodian for Phillips, and Joe Mager, a community association manager for

01 Phillips. (Dkts. 106-109.)¹ For the reasons described below, the undersigned recommends
02 that the motion for contempt be DENIED.

03 BACKGROUND AND ARGUMENTS

04 Defendants served its first subpoena on Phillips in February 2010, seeking production
05 of responsive documents on or before March 5, 2010. (Dkt. 92, Exs. A-C.) Phillips had
06 previously, in response to an August 2009 subpoena, produced documents to plaintiff. By
07 declaration dated February 22, 2010, Castanes responded to defendants' subpoena: "No
08 documents are enclosed. Phillips has produced all responsive documents through plaintiff's
09 counsel." (*Id.*, Ex. D.)

10 Believing the prior production to be incomplete, defendants served an amended
11 subpoena on May 18, 2010, requesting Phillips make available for review all documents
12 regarding plaintiff on or before June 1, 2010. (*Id.*, Ex. F.) Receiving no response, defendants
13 sent Phillips a letter, dated June 7, 2010, requesting a response to the subpoena and advising as
14 to their intent, if necessary, to proceed with a motion for contempt. (*Id.*, Ex. G.) Again
15 receiving no response, defendants, on June 11, 2010, sent an e-mail to counsel for plaintiff
16 asking for any insight or knowledge as to the lack of a response from Phillips. (*Id.*, Ex. H. at 5.)
17 In response to this e-mail, both counsel for plaintiff and Mager indicated that a production of
18 documents would be forthcoming, subject to a privilege review. (*Id.* at 3 & 5.) Additional
19 e-mails exchanged on this same date reflect that defendants disputed the propriety of

20 ¹ Defendants note in their reply that counsel for plaintiff does not represent Phillips. They
21 maintain plaintiff lacks standing to oppose defendants' motion, *see Lujan v. Defenders of Wildlife*, 504
22 U.S. 555, 560 (1992), and request that their motion be granted as unopposed. However, because Phillips
did respond to defendants' motion through the declarations of Castanes and Mager (Dkt. 106 & 107), the
court declines to accept defendants' suggestion.

01 conducting a privilege review given the already long delay in the production of documents and
02 the lack of any explanation for that delay. (*Id.* at 1-4.)

03 Defendants aver that they received no indication as to whether the documents would be
04 produced or assurance as to when the production would take place. They filed a motion for
05 contempt on June 14, 2010. (Dkt. 91.) On June 17, 2010, defendants withdrew their original
06 motion due to a technical defect and filed the motion currently under consideration. (Dkts.
07 94-95.) Defendants seek production of all responsive documents (by making them available
08 for review and duplication) and \$3,500 in attorney's fees and costs associated with their
09 attempts to collect responsive documents from Phillips. (Dkts. 95 & 113.)

10 In opposition to the motion, plaintiff, Castanes, and Mager aver that Phillips mistakenly
11 believed it had produced all responsive documents in August 2009. (Dkt. 106, ¶¶2-3 and Dkt.
12 107, ¶¶3-4.) Plaintiff posits, and Castanes and Mager declare, that it appears Phillips did not
13 receive the May 2010 subpoena until it received defendants' June 7, 2010 letter. (Dkt. 92, ¶7
14 and Ex. F at 9 (defendants' counsel's declaration reflecting service of subpoena only on counsel
15 for plaintiff) and Dkt. 106, ¶4, Dkt. 107, ¶¶5-6 (Castanes and Mager assert knowledge of the
16 May 2010 subpoena only as of June 7, 2010).) Plaintiff states that it made three and a half
17 boxes of documents from Phillips available to defendants on June 15, 2010. Plaintiff,
18 Castanes, and Mager aver that Phillips has now produced all responsive documents. (Dkt.
19 106, ¶10 and Dkt. 107, ¶8.) Plaintiff argues that a motion was not necessary to compel
20 compliance and, consequently, that there can be no showing that the costs of the motion are a
21 harm arising from Phillips' inadequate response to subpoenas. Plaintiff also asserts that
22 defendants' conclusory statement of harm does not constitute sufficient proof of actual harm.

01 *Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6, 9 (N.D. Ill. 1986) (“[A] compensatory
02 fine for civil contempt requires proof of actual damages[.]”)

03 In reply, defendants challenge the contention as to any misunderstanding or confusion
04 on the part of Phillips in relation to the February 2009 subpoena. They note that Phillips
05 should have, at a minimum, produced additional records, such as the minutes from monthly
06 board meetings, dated after the initial August 2009 production. Defendants further maintain
07 that Phillips cannot reasonably assert confusion given their thirty-three years of business
08 experience (Dkt. 114, ¶¶10-11 and Exs. 3 & 4) and the fact that the letter accompanying the
09 subpoena directed Phillips to contact defendants if it had any questions. They add that
10 Phillips, without any significant supplemental explanation, ultimately produced additional
11 documents only in response to the filing of the motion for contempt.

12 Defendants also dispute the contention that Phillips did not receive the May 2010
13 subpoena until June 7, 2010. They provide an affidavit reflecting that Tim Pfohl, authorized to
14 accept process service on behalf of Phillips, accepted service of the subpoena on May 18, 2010.
15 (Dkt. 114, Ex. 1.) Defendants stress that their efforts to avoid a motion for contempt did not
16 end with service of the second subpoena, pointing to their June 7, 2010 letter and June 11, 2010
17 e-mail, only the latter of which resulted in any response from Phillips. Defendants also
18 maintain their belief that Phillips has not, to date, fully complied with the subpoenas. (*See*
19 *Dkt. 114, ¶¶4-9.*)

20 Finally, defendants argue in favor of sanctions against Phillips. In support, they point
21 to their many genuine efforts to avoid this motion, their belief that Phillips has not yet produced
22 all responsive documents, and the lack of any “adequate excuse” for Phillips’ failure to comply

with two subpoenas, Fed. R. Civ. P. 45 (e).

DISCUSSION

Federal Rule of Civil Procedure 45 permits the use of a subpoena to command the production or permit inspection of responsive documents or other materials in the subpoena recipient's possession, custody, or control. Fed. R. Civ. P. 45(a)(1)(A)(iii). After service, the recipient may comply with the subpoena, submit an objection, or move to quash or modify the subpoena according to the procedures set forth in Rule 45. Fed. R. Civ. P. 45(c)-(d). "The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena." Fed. R. Civ. P. 45(e).²

Disobedience of a specific and definite court order – in this case a subpoena³ – through failure to take all reasonable steps to comply constitutes civil contempt. *In re Dual Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). "The contempt 'need not be willful,' and there is no good faith exception to the requirement of obedience[.]" *Id.* (quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987)). However, a finding of contempt is not appropriate if the response is based on a good faith and reasonable interpretation of the court order's demands. *Id.* (citing *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)). "Substantial compliance"

² This rule further provides that "[a] nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii)." Fed. R. Civ. P. 45(e). Rule 45(c)(3)(A)(ii), requiring that a subpoena be quashed or modified where it requires a nonparty to travel more than 100 miles, is not at issue in the motion under consideration.

³ As explained in the 1991 Amendment to Rule 45: "Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions."

01 serves as a defense, “and is not vitiated by ‘a few technical violations’ where every reasonable
02 effort has been made to comply.” *Id.* (quoting *Vertex Distrib. Inc.*, 689 F.2d at 891). The
03 party pursuing civil contempt must support its allegations with clear and convincing evidence.
04 *Id.* (citing *Vertex Distrib., Inc.*, 689 F.2d at 889). *Accord Wolfard Glassblowing Co. v.*
05 *Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997). The Court may impose sanctions for
06 contempt, including attorney’s fees and costs, in order to coerce compliance and/or compensate
07 defendants for related injuries. *Int’l Union v. Bagwell*, 512 U.S. 821, 829 (1994) (citing *United*
08 *States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947)); *Perry v. O'Donnell*,
09 759 F.2d 702, 705 (9th Cir. 1985). *See also In re Crystal Palace Gambling Hall, Inc.*, 817
10 F.2d at 1365 (a sanction for “civil contempt is characterized by the court’s desire to . . .
11 compensate the contemnor’s adversary for the injuries which result from the noncompliance.”)

12 In this case, Phillips inadequately responded to defendants’ first subpoena. In addition
13 to the fact that Phillips failed to then locate several boxes of relevant, unproduced documents, it
14 should have, at a minimum, investigated the existence of documents dated after the date of its
15 initial production. Phillips’ efforts in response to defendants’ second subpoena were likewise
16 insufficient. While Castanes and Mager both declare that they did not receive a copy of this
17 subpoena until June 7, 2010, the evidence shows its proper service on Phillips on May 18, 2010.
18 Pfohl, the individual who accepted service of the subpoena, is revealed in the declarations from
19 Castanes and Mager as Phillips’ Director of Community Association Properties and Mager’s
20 immediate supervisor. (Dkt. 106, ¶7 and Dkt. 107, ¶7.) Moreover, even if it could be shown
21 that Pfohl failed to route the subpoena to the proper individuals within Phillips, it is notable that
22 Phillips did not, as of June 7, 2010, contact defendants in regard to the subpoena, instead

01 waiting to respond until defendants contacted plaintiff by e-mail several days later. These
02 facts raise the question as to whether Phillips' responses can be deemed reasonable and
03 constituting substantial compliance.

04 There is, however, evidence arguing against a finding of contempt. Mager provides an
05 explanation for the response to defendants' first subpoena. He states that he had not
06 previously responded to a subpoena prior to the one issued by plaintiff in August 2009 and that
07 he believed all responsive files had been collected at that time. (Dkt. 107, ¶3.) Mager adds
08 that he was advised by plaintiff's counsel in February 2009 that Phillips could respond to
09 defendants' subpoena by stating that all responsive documents had been produced. (*Id.*, ¶ 4.)

10 Also, taking as true the assertion that the appropriate individuals within Phillips had not
11 been informed of defendants' second subpoena, the delay between the June 7, 2010 letter and
12 the June 11, 2010 e-mail exchange, while unexplained, was minimal. Moreover, both Mager's
13 declaration and his June 11, 2010 e-mail to counsel support the contention that he had begun
14 working on the requested document production prior to the latter date. (*Id.*, ¶¶ 6-7 and Dkt. 92,
15 Ex. H at 3.)

16 Additionally, while defendants claim they had no indication as to whether or when
17 documents would be produced, the June 11, 2010 e-mails reveal that counsel for plaintiff told
18 defendants Phillips indicated a supplemental production would be "ready soon[.]" that plaintiff
19 did not expect to find "much, if any, privileged documents" in that production, and that the
20 privilege review "may take . . . a few days[.]" (Dkt. 92, Ex. H at 1, 5.) Finally, while
21 defendants maintain that the production of documents remains incomplete, there is no dispute
22 that Phillips made available to defendants a substantial production of responsive documents

01 shortly after June 11, 2010.

02 The Court finds defendants' frustration in the long delay prior to Phillips' production of
03 documents understandable. It also expresses grave concern over Phillips' practices in relation
04 to the subpoenas. However, the Court finds Phillips' explanation for its failures adequate.
05 The evidence outlined above supports a good faith and reasonable interpretation of the
06 subpoenas under the circumstances and, ultimately, substantial compliance with those
07 subpoenas. Accordingly, the undersigned concludes that the evidence does not support a
08 finding of contempt.


09 At the same time, a declaration submitted by defendants in reply raises a legitimate
10 question as to the adequacy of Phillips' production of documents. (*See* Dkt. 114.) While it is
11 not clear Phillips has any remaining responsive documents in its possession, custody, or
12 control, defendants' declaration includes a detailed explanation as to the cause for their
13 concern, including the identification of specific types and categories of potentially missing
14 documents. (*Id.*, ¶¶4-9.) As such, the Court recommends that Phillips be ordered to conduct
15 an additional review of documents in its possession, custody, or control, and to make available
16 for review and duplication any additional responsive documents within **ten (10) days** of the
17 date of the Order issued in association with this Report and Recommendation. Phillips should
18 utilize the amended subpoena from defendants and the above-described declaration both in
19 conducting its additional document review and in submitting a supplemental response to the
20 subpoena.

21 CONCLUSION

22 In sum, the Court recommends that defendants' motion for contempt (Dkt. 95) be

01 DENIED, but Phillips ORDERED to conduct an additional document review. A proposed
02 order accompanies this Report and Recommendation. As stated in the proposed order, and in
03 accordance with the Court's June 3, 2010 Order of Reference, any objections must be filed
04 within **three (3) business days** of the date of this Report and Recommendation.

05 DATED this 13th day of August, 2010.

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08 Mary Alice Theiler
United States Magistrate Judge